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Nos. 98-405 & 98-406

IN THE

# Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

*Appellant,* and

GEORGE PRICE, *et al.*,

*Appellants,*

v.

BOSSIER PARISH SCHOOL BOARD,

*Appellee.*

**On Appeal from the United States District Court for the District of Columbia**

## REPLY BRIEF ON REARGUMENT OF APPELLANTS GEORGE PRICE, *ET AL.*

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TABLE OF CONTENTS

Page

I. THE COVERED JURISDICTION HAS THE BURDEN OF PROVING THAT ANY PROPOSED VOTING CHANGE LACKS A RACIALLY DISCRIMINATORY PURPOSE.....1

II. SECTION 5 PRECLEARANCE SHOULD NOT BE GRANTED TO A PROPOSED VOTING CHANGE ADOPTED WITH A RACIALLY INVIDIOUS, BUT NON-RETROGRESSIVE, PURPOSE. .....2

CONCLUSION.....10

# TABLE OF AUTHORITIES


Page

*CASES*:

*Beer* v. *United States*, 425 U.S. 130 (1976) ..... 2, 7

*Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) ..... 7

*Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) ..... 10

*City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987) ..... 7

*City of Richmond* v. *United States*, 422 U.S. 358 (1975) ..... 6-7

*Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)..... 4

*Holder* v. *Hall*, 512 U.S. 874 (1994)..... 5

*Lane* v. *Wilson*, 307 U.S. 268 (1939) ..... 4

*Miller* v. *Johnson*, 515 U.S. 900 (1995)..... 1, 4

*Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979)..... 4-5

*Reno* v. *Bossier Parish School Board*, 520 U.S. 471 (1997)..... *passim*

*Rogers* v. *Lodge*, 458 U.S. 613 (1982)..... 4

*Steffel* v. *Thompson*, 415 U.S. 452 (1974)..... 10

*Thornburg* v. *Gingles*, 478 U.S. 30 (1986)..... 5, 6

*Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)..... *passim*

*Washington* v. *Davis*, 426 U.S. 229 (1976)..... 4

*CONSTITUTIONAL PROVISIONS*:

U.S. Const. amend. XV ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

*STATUTORY PROVISIONS*:

Voting Rights Act of 1965,

42 U.S.C. § 1973 (§ 2) ..... *passim*

42 U.S.C. § 1973b(c) (§ 4) ..... 3

42 U.S.C. § 1973c (§ 5) ..... *passim*

42 U.S.C. § 1973d ..... 4

42 U.S.C. § 1973h ..... 3

*OTHER AUTHORITY*:

F. Frankfurter & J. Landis, *The Business of the Supreme Court* (1928) ..... 10

## I. THE COVERED JURISDICTION HAS THE BURDEN OF PROVING THAT ANY PROPOSED VOTING CHANGE LACKS A RACIALLY DISCRIMINATORY PURPOSE.

The cursory argument of the Bossier Parish School Board ("School Board" or "Appellee") that the defendants bear the burden of proving in a § 5 declaratory judgment action that a covered jurisdiction has a non-retrogressive discriminatory purpose (Appellee's Br. at 21-25)[1] is contrary to the language of the Voting Rights Act, its history, and this Court's decisions. *See Miller* v. *Johnson,* 515 U.S. 900, 924 (1995) ("the State [the covered jurisdiction] has the burden to prove a nondiscriminatory purpose under § 5"). Appellee's effort to shift the burden of proof is based principally on the incorrect premise that the Attorney General conceded the point in *Bossier I, Reno* v. *Bossier Parish School Board,* 520 U.S. 471 (1997), App. 29a. Appellee does not claim that the Price Appellants ever made any such "concession"; in any event Appellee's argument is incorrect because the Attorney General's brief in *Bossier I* addressed who would bear the burden of proof if a violation of § 2 established independent cause for denial of preclearance under § 5. *See* App. 29a-30a.

The School Board also mischaracterizes the dissenting opinion in *Bossier I* when it argues that the United States "has the burden to prove unconstitutional purpose in a Section 5 court, just as it would in **'any [constitutional] challenge'** in district court." Appellee's Br. at 2-3, quoting *Bossier I,* App. 69a (Stevens, J.; dissenting in part and concurring in part). The quoted statement from Justice Stevens' opinion actually refers to § 2; the same sentence expressly recognizes that the burden to prove nondiscriminatory purpose is on the covered jurisdiction:

> *While the burden of disproving discriminatory purpose* or retrogressive effect *is on the submitting jurisdiction,* if

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[1] "Appellee's Br." refers to the Brief of Appellee on Reargument; "App." refers to the Appendix to the Jurisdictional Statement in No. 98-405.

> the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in **any § 2 challenge**, should rest on the Attorney General. [App. 69a, Stevens, J., dissenting in part and concurring in part (emphases added).]

## II. SECTION 5 PRECLEARANCE SHOULD NOT BE GRANTED TO A PROPOSED VOTING CHANGE ADOPTED WITH A RACIALLY INVIDIOUS, BUT NON-RETROGRESSIVE, PURPOSE.

The School Board is incorrect that "no one argues that the statutory language can be consistently construed to prohibit only a retrogressive effect but simultaneously prohibit a nonretrogressive purpose." Appellee's Br. at 22 n.10. That is precisely what the United States and the Price Appellants argue, because it is the word "effect" in § 5 that has been construed to encompass only retrogressive voting changes. *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

In its effort to limit the coverage of § 5 only to retrogression, Appellee distorts the language and legislative history of the statute, twists the straightforward purpose inquiry into speculation concerning other hypothetical voting plans, expands the concept of retrogression beyond recognition, and ignores the interest of minority voters in procedural fairness. The statute and this Court's decisions call for a purpose inquiry that provides a full evidentiary examination of the proof relevant to racially discriminatory intent, unfettered by a restriction to retrogression. The Price Appellants urge the Court to reject the proposition that § 5 preclearance must be granted to a non-retrogressive voting change even if it was adopted with an invidious racially discriminatory purpose.

A. Appellants' arguments are not based on a "policy reason to stretch Section 5 to reach nonretrogressive changes motivated by a discriminatory purpose." Appellee's Br. at 2. This purpose inquiry is mandated by the statute: Section 5 requires that a covered jurisdiction demonstrate that each

voting change "does not have the purpose" of denying or abridging the right to vote on account of race.

The discourse in Appellee's Brief on the differences between a direct challenge to voting discrimination under the Fifteenth Amendment and the operation of § 5 thus is irrelevant. The School Board's citation to *Bossier I* for the proposition that "Section 5 is not and cannot be coextensive with the Constitution," Appellee's Br. at 6, citing *Bossier I*, App. 33a, is especially puzzling because, at the page cited, *Bossier I* discusses the differences between the coverage of § 2 and § 5 of the Voting Rights Act, with no reference to how § 5 corresponds with any constitutional provision.

The School Board claims that § 5 must now be reinterpreted because Congress' goal in adopting § 5 was only to prevent "'backsliding' from the improvements to the discriminatory *status quo* that would be caused by the Act's other provisions." Appellee's Br. at 7. This reading of § 5 effectively deletes the "purpose" prong. Appellants have presented in previous briefs the legislative history demonstrating that this was not intended, because Congress well knew that the status quo was rife with many kinds of discrimination that successfully prevented black voter registration and that would not be uprooted simply with the passage of these other provisions.[2] The "tests and devices" suspended by § 4 of the Act are very specifically defined: Prerequisites to registration or voting based on literacy or educational achievement, good moral character, or voucher by other voters. 42 U.S.C. § 1973b(c). The Act does not invalidate the poll tax outright, but gives the Attorney General power to bring actions challenging poll taxes where they have the purpose or effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973h.

The Voting Rights Act did not, at the moment of its adoption, automatically halt discriminatory districting plans,

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[2] *See* Brief for the Federal Appellant at 18-24; Brief of Appellants George Price, *et al.*, at 22-25 ("Price Opening Brief"); Brief on Reargument for the Federal Appellant at 9-13.

registration procedures, or other mechanisms that already were known to exclude or impair black voter participation. *See, e.g., Lane* v. *Wilson,* 307 U.S. 268 (1939) (12-day limit on registration for voters not previously eligible to vote under grandfather clause); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) (racially gerrymandered municipal boundary). Congress clearly recognized that, after it invalidated tests and devices, there would be continued and renewed efforts to keep black voters from the polls. Congress included in the Voting Rights Act such extraordinary remedies as permitting the appointment by the Attorney General of federal examiners to monitor elections, 42 U.S.C. § 1973d, because it concluded that the full panoply of discrimination aimed at keeping black citizens from voting only could be rooted out, on a case-by-case basis, by the operation over time of § 5 as well as § 2 and other provisions of the Act.

B. The analysis of discriminatory purpose is not a "free-floating" inquiry that requires jurisdictions to "disprove the validity of hypothetical alternatives." Appellee's Br. at 4, 3. Far from floating free, the inquiry is firmly tethered to the framework adopted in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). *See* App. 48a. This Court's holding in *Bossier I* that a covered jurisdiction's "purpose" should be measured in a § 5 declaratory judgment action using the *Arlington Heights* framework drew on one of the most fundamental principles the Court has articulated in civil rights cases in the last quarter century. When a federal court is called upon to inquire about whether a governmental body has acted with an invidious racial intent, it cannot limit its inquiry to the effects of the action alone, because "'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" *Rogers* v. *Lodge,* 458 U.S. 613, 617 (1982), quoting *Washington* v. *Davis,* 426 U.S. 229, 240 (1976). *Accord Miller,* 515 U.S. at 913 ("the presumed racial purpose of state action, not its stark manifestation" violates the Constitution); *Personnel Adm'r of Massachusetts* v. *Feeney,* 442 U.S. 256, 279 (1979). Under *Arlington Heights,* more than a "deliberate

perpetuation of the *status quo*," Appellee's Br. at 4, is required to violate the purpose prong of § 5; it must be a racially motivated perpetuation of the status quo.

Appellee is simply wrong that preserving the prohibition in § 5 of voting changes motivated by invidious racial discrimination would expand the § 5 inquiry to require comparisons with hypothetical, undiluted plans, or force covered jurisdictions to "maximize" minority representation in districting plans. *See* Appellee's Br. at 4, 12-17. What the School Board characterizes as the Department of Justice's "maximization policy" of the 1990s sheds no light on the intent of Congress in 1965. Moreover, the authorities the School Board tries to muster do not support its conclusion that demonstrating a legitimate non-racial purpose requires maximization. For example, Appellee states: "Under appellants' free-floating 'purpose' inquiry, . . . Justice Department lawyers or Section 5 'courts must *choose* an objectively reasonable alternative practice as a benchmark for the [dilutive purpose] comparison.'" Appellee's Br. at 17, quoting *Holder* v. *Hall,* 512 U.S. 874, 888 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (emphasis supplied by Appellee). In fact, Justice O'Connor stated that in a *§ 2 vote dilution case* a "court must choose an objectively reasonable alternative practice as a benchmark for the dilution comparison." Her analysis had nothing to do with "purpose."[3]

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[3] Appellee asserts that § 2 prohibits "a dilutive purpose," and cites *Thornburg* v. *Gingles*, 478 U.S. 30, 43-44 (1986), for the proposition that "Section 2 prohibits both an unintentional dilutive effect ('result') and a purposeful dilutive effect." Appellee's Br. at 11. To the contrary, § 2 provides no support for Appellee's hypothesis that since retrogressive effects are reached by § 5, it is unnecessary to reach non-retrogressive but racially hostile purposes. The Court held in *Bossier I* that "[w]hen Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component." App. 40a (emphasis in original) (citations omitted). *Thornburg* described the legislative history demonstrating that discriminatory intent or purpose is not required to establish a violation of § 2. *Thornburg,* 478 U.S. at 43-44.

Appellee argues that a prohibition of discriminatory purpose "fails to significantly expand a corresponding prohibition against an impermissible effect." Appellee's Br. at 11. By conceding that the purpose prong reaches some racially discriminatory voting changes not barred from preclearance by the effect test, Appellee identifies an important category of cases that should be covered by § 5, even if the number of such cases is not significant. The prohibition of discriminatory purpose bars some voting changes without a retrogressive effect because, in a discriminatory purpose analysis under *Arlington Heights*, "effect" is relevant but not dispositive. *See* App. 45a. The key to a covered jurisdiction's presentation of a prima facie case on "purpose" in a § 5 declaratory judgment action is its ability to state and support race-neutral, objectively verifiable reasons for its proposed voting change. Defendants then must point to evidence of racial intent. A neutral or ameliorative plan may be shown to be racially discriminatory under this analysis. On the other hand, a neutral or ameliorative plan that fails to "maximize" minority voting strength should be precleared if the evidence overall shows that the plan was not the product of racial discrimination but was adopted for sound and appropriate reasons.

C. In an effort to assure the Court that racist and insidious voting changes will not have to be precleared if "purpose" is limited to retrogressive intent, Appellee is forced to expand the concept of retrogression beyond recognizable bounds. *See, e.g.,* Appellee's Br. at 13 n.6 (suggesting that a voting change making black voter participation "literally impossible" would be retrogressive if the status quo makes it "nearly impossible"). This effort is based on a misreading of the § 5 cases and misunderstanding of the role of § 5.

The School Board suggests that the annexation at issue in *City of Richmond* v. *United States,* 422 U.S. 358 (1975), had a "retrogressive effect" but was "permissible under Section 5 unless the purpose of the annexation [was] to cause *such retrogression*, rather than to further a legitimate goal."

Appellee's Br. at 11 (emphasis added). Contrary to Appellee's suggestion, the annexation in *City of Richmond* was held by the Court not to be retrogressive within the meaning of the term "effect." *See Beer*, 425 U.S. at 139 n.11 ("*City of Richmond* . . . thus decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5"). The remand in *City of Richmond* was not tied to "retrogressive purpose," but to the broader question of discriminatory purpose, *i.e.*, whether the annexation was "taken for the purpose of discriminating against Negroes on account of their race" because such a discriminatory enactment "has no legitimacy at all under our Constitution *or under the statute*." 422 U.S. at 378 (emphasis added).

Appellee attempts to distinguish *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), by arguing that the Court's decision is best explained on the basis that the annexation could have a retrogressive effect on hypothetical future black voters, and so could be characterized as being infected with a retrogressive purpose. Appellee's Br. at 20. The text does not support such a reading. Coupled with Appellee's effort to turn *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), into a holding on retrogressive effect or retrogressive purpose even though the district court specifically found no retrogression, 549 F. Supp. at 516, Appellee is sowing seeds of confusion that will confound future § 5 cases. If hypothetical future black voters become part of the retrogression analysis, it has no logical boundary. Indeed, under Appellee's expansive retrogression theory, every § 5 declaratory judgment trial in a redistricting case could involve days of testimony by competing demographic experts hypothesizing different scenarios on the potential growth of black voting populations. Moreover, Appellee does not limit its theory to districting cases, but would consider hypothetical future retrogressive effects of a myriad of voting changes, even a decision to reduce polling place hours. *See* Appellee's Br. at 20-21. If a covered jurisdiction really curtailed polling hours the day before the first black voter moves in, and application of the *Arlington Heights* framework reveals an effort to keep that one black citizen

from voting, the issue should be analyzed as straightforward, racially invidious discrimination rather than as hypothetical, future retrogression based on the impact on a single voter.

D. The School Board's argument that preclearance of voting changes adopted with racially invidious intent is harmless as long as the effect is not retrogressive leads it to some strange conclusions. Appellee argues that because the § 5 declaratory judgment court has power only to preclear or to reject proposed voting changes, § 5 should not bar purposefully discriminatory neutral or ameliorative changes, lest denial of preclearance harm minority voters. Appellee's Br. at 4-5. It should not be assumed that the status quo will be maintained upon rejection of a voting change that is the product of racial animus, but neutral or ameliorative in effect. Covered jurisdictions often proffer changes because maintaining the status quo is not an option. Redistricting, for example, must be done after the census to comply with one-person one-vote requirements. Maintaining a maladjusted plan is not an option when the court denies preclearance to a neutral plan adopted with a racially hostile intent.

Giving black citizens the opportunity to advocate locally for fairness and non-discriminatory treatment upon rejection of such a proposal does justice to them and furthers the principles of democracy and fair play that benefit all citizens. Even where a proposed voting change is unmasked in a § 5 proceeding as the product of invidious racial animus, the federalism considerations that underlie § 5 require that the covered jurisdiction go back to the community, through its ordinary processes, to consider alternatives. Such a return to local processes, so they can operate free of racial bias, is a fairer result than building into the interpretation of the statute an assumption that black and other minority voters benefit by a federal court's preclearance of a non-retrogressive voting change adopted with racial animus against them.

The proof in this case demonstrates that Mr. Price and the other private Appellants were denied this basic opportunity to have their ideas and issues considered, free of racial bias, in the School Board's redistricting process. The School Board

persistently and consistently rejected the efforts of representatives of the black community to be involved in the districting process, instead making critical decisions behind closed doors. Price Opening Brief at 33-37. The School Board did an about-face regarding the Police Jury plan, App. 30a-31a, as soon as it realized that it could draw two compact, contiguous majority-black election districts in a 12-member single-district election plan while complying with one-person, one-vote principles. Price Opening Brief at 33-37. The Police Jury plan flew in the face of the School Board's traditional districting goals and faced strong public opposition expressed in a petition and public hearing. *Id.* at 36. The plan wreaked havoc with incumbencies, contained districts that were not compact, distributed schools unevenly across the election districts, and had one district that was not contiguous. *Id.* at 29. The plan violated a state law requirement that no election district deviate from the one-person, one-vote ideal by more than 5%. *Id.* The plan avoided the obvious opportunity to create a majority-black district in Bossier City and a readily discernible majority-black district in the northern part of the parish. *Id.* at 28-29.

The district court summarized its findings as "tending to establish that the board departed from its normal practices," and found that this "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." App. 6a, 7a. The School Board's motive was clear: With an unresolved federal court school desegregation case and a history of shunting aside concerns of black parents about the education of their children, Price Opening Brief at 30-33, election of candidates chosen by the black community to the School Board would require attention to that community's concerns. The district court found: "The intent [this school desegregation history] proves . . . is a tenacious determination to maintain the status quo." App. 7a.

It is absurd to suggest, in a case in which there never has been a black majority election district, and no black School Board member ever had been elected at the time the plan was

adopted, that the evil the Court needs to fear is "maximization" of minority voting strength. The School Board's proposed plan fails the § 5 purpose prong not because it rejected any particular district lines, but because it denied the Price Appellants and other black citizens the simple justice of an opportunity to have their voices heard free of discriminatory intent against them in the process of redistricting the school district in which they live and pay taxes, and where their children and grandchildren attend school.

Indeed, the important principles of federalism that Appellee invokes, *see* Appellee's Br. at 17, are consistent with a holding that any voting change should be denied § 5 preclearance if the covered jurisdiction cannot show that it lacks a racially discriminatory purpose:

> No such problem [of whether a federal remedy intrudes in subjects basically of concern to the States] is raised by a prohibition against invidious discrimination of any sort .... Since the Civil War, the Federal Government and the federal courts have been the "'*primary* and powerful reliances'" in protecting citizens against such discrimination. *Steffel* v. *Thompson*, 415 U.S. 452, 464 [(1974)], quoting F. Frankfurter & J. Landis, *The Business of the Supreme Court* 65 (1928). [*Cannon* v. *University of Chicago*, 441 U.S. 677, 708 (1979) (emphasis in original).]

## CONCLUSION

For these reasons and those set forth in the earlier briefs in this matter, the Court should reverse the judgment below.

Respectfully submitted,

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